

IN THE SUPREME COURT OF MISSOURI

No. SC85747

Fernando Ibarra Maldonado, et al.

Plaintiff/Respondent

v.

Gateway Hotel Holdings, Inc.,

Defendant/Appellant.

Appeal from the Circuit Court of the City of Saint Louis,

The Honorable Michael Calvin, Judge, Division 13

SUPPLEMENTAL BRIEF OF RESPONDENT

Submitted by:

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Other authority:

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SUPPLEMENTAL ISSUES PRESENTED BY THE COURT

On October 7, 2004, this Court issued an Order directing the parties to file supplemental briefs on or before October 18, 2004, regarding the following questions of law:

If a party submits instructions and receives a verdict and judgment on a theory that is not supported by the evidence and no other theory is offered to the jury by that party, is a remand of the case proper? If so, on remand can the party that received the judgment submit the case on a theory not raised in the first trial?

POINTS RELIED ON

- I. An appellate court may properly remand a case in which a party submits instructions and receives a verdict and judgment on a theory that is not supported by the evidence and no other theory is offered to the jury by that party. Further, on remand, the party that received the verdict and judgment may submit the case on a theory that was not raised in the first trial.**

Bell v. Green, 423 S.W.2d 724 (Mo. banc 1968)

Muse v. Woyner, 698 S.W.2d 26 (Mo.App.S.D. 1985)

Nelson v. Grice, 411 S.W.2d 117 (Mo. 1967)

Missouri Rule of Civil Procedure 84.14

ARGUMENT

I. An appellate court may properly remand a case in which a party submits instructions and receives a verdict and judgment on a theory that is not supported by the evidence and no other theory is offered to the jury by that party. Further, on remand, the party that received the verdict and judgment may submit the case on a theory that was not raised in the first trial.

A. Missouri law clearly establishes that an appellate court has the discretion to remand a case in which a party obtained a verdict and judgment on a theory that is not supported by the evidence, even in situations where the theory upon which the verdict and judgment was obtained was the only theory that was submitted to the jury.

Missouri Rule of Civil Procedure Rule 84.14 establishes the appropriate means by which an appellate court may dispose of a case on appeal. Among other options, that Rule provides an appellate court with the authority to remand. Rule 84.14 provides:

The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or

in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case.¹

There are numerous circumstances under which an appellate court may appropriately remand a case for a new trial. On numerous occasions, appellate courts have found that the prevailing party submitted the case to the jury on a legal theory which was not supported by the evidence, but remanded the case for a new trial because the evidence presented may have supported relief under other legal theories.² The case law addressing this issue establishes the following generally-accepted principle:

Where a plaintiff fails to substantiate the theory upon which his case is tried but does show a state of facts which might entitle him to recover if his case were brought upon a different theory, the

¹ Missouri Rule of Civil Procedure 84.14.

² See, *Muse v. Woyner*, 698 S.W.2d 26 (Mo.App.S.D. 1985); *Nelson v. Grice*, 411 S.W.2d 117 (Mo. 1967); *Bell v. Green*, 423 S.W.2d 724 (Mo. banc 1968); *Fairbanks v. Chambers*, 665 S.W. 2d 33 (Mo.App.W.D. 1984); *Obermeyer v. Hentschel*, 389 S.W.2d 203 (Mo. 1965); *Stouse v. Stouse*, 270 S.W.2d 822 (Mo. 1954); *East v. McMenemy*, 266 S.W.2d 728 (Mo. 1954); *Yarrington v. Lininger*, 327 S.W.2d 104 (Mo. 1959).

appellate court, in the exercise of its sound discretion, may remand the cause...³

Indeed, this Court has stated that “[t]he furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had...”⁴ Appellate courts have also recognized that an appellate court should be particularly hesitant to reverse a case outright in instances where there is evidence of wrongdoing by the defendant.⁵

Therefore, if the appellate court determines that a plaintiff received a verdict and judgment on a theory of law that was not supported by the evidence, the appellate court may, and should, remand the case if it determines that the facts of the case demonstrate that the plaintiff may have been entitled to recover upon a different theory of law. The appellate court should not reverse the judgment without remanding unless it is convinced that the facts of the case are such that the plaintiff could not recover under any theory; an appellate court should reverse a judgment in favor of a plaintiff only when it is convinced that there exists no plausible theory of recovery.

³ *Muse*, 698 S.W.2d at 32.

⁴ *Nelson*, 411 S.W.2d at 126 (citing *East*, 266 S.W.2d at 732; *Yarrington*, 327 S.W.2d at 111).

⁵ See, *Obermeyer*, 389 S.W.2d 203.

Here, the jury returned a substantial verdict in favor of the plaintiff. On appeal, this Court views the evidence, and the reasonable inferences from the evidence, in the light most favorable to the plaintiff. When viewed from that perspective, the evidence supports the jury's verdict on the theory of liability set forth in plaintiff's verdict-directing instruction. Defendant received a fair trial, and the judgment in favor of plaintiff should therefore be affirmed. However, if this Court finds that the evidence and the reasonable inferences from the evidence do not support the jury's verdict, this case must be remanded for a new trial on one or more of the other legal theories supported by the evidence.

B. Further, it is equally clear under Missouri law that where an appellate court remands because of insufficient evidence to support a verdict under the theory submitted, the plaintiff may, upon retrial, submit the case to the jury on a theory that was not raised in the first trial.

The same case law which establishes that an appellate court may properly remand a case in which a verdict was returned based upon a theory that was not supported by the evidence further establishes that, upon remand, the party may submit the case to the jury on a theory that was not raised during the first trial. Regarding the permissible theories upon which a party may submit his case upon remand, this Court has stated:

...[E]ven though the plaintiff fails to substantiate the theory upon which his case was tried, if he nevertheless shows a state of facts

which might entitle him to recover if his case were brought upon a proper theory, the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which his evidence discloses.⁶

In many instances Missouri courts have permitted a plaintiff who obtained a verdict and judgment on a theory that was not supported by the evidence to amend his petition upon remand and submit his case under a theory which was not raised or submitted at the first trial. For instance, in *Muse v. Woyner*, plaintiffs sued defendant under a theory of constructive trust.⁷ On appeal, the Southern District Court of Appeals held that although the plaintiffs pursued the wrong legal theory at trial, they should nevertheless be permitted to litigate their claim against defendant under new pleadings, as an action at law based on a debtor-creditor relationship.⁸

⁶ *Nelson*, 411 S.W.2d at 126 (citing *East*, 266 S.W.2d at 732; *Yarrington*, 327 S.W.2d at 111).

⁷ 698 S.W.2d 26.

⁸ *Id.* at 32.

Similarly, in *Nelson v. Grice*, the trial court found for a lessee, who had sued his lessors for trespass.⁹ On appeal, this Court held that there was no technical trespass, but suggested that the lessee might have prevailed at trial under a breach of contract theory.¹⁰ This Court remanded the case and suggested that plaintiff amend his petition and submit his case upon theories that were not raised in the first trial.¹¹

In *Bell v. Green*, a passenger sued a car owner for permitting a third person to negligently drive the car.¹² At trial, the plaintiff proceeded under the theory that the driver was an “instrument” of defendant or on a joint venture with him. On appeal, this Court held that the evidence did not support relief under the theories that plaintiff relied on at trial, but suggested that defendant might be liable “for his own negligence.”¹³ This Court remanded the case “in order that plaintiff may, if so advised, ask leave to amend her petition and thus seek a retrial . . .”¹⁴

⁹ 411 S.W.2d at 121.

¹⁰ *Id.* at 126.

¹¹ *Id.* (relying upon Rule 83.13 (now repealed), which provided for outright reversal “unless justice requires otherwise.”)

¹² 423 S.W.2d 724.

¹³ *Id.* at 731-732.

¹⁴ *Id.* at 732.

Likewise, in *Fairbanks v. Chambers*, plaintiffs brought suit against several individual sellers (rather than the sellers' corporate employer) under a theory of breach of an implied warranty of fitness in the sale of goods.¹⁵ On appeal, the Western District Court of Appeals held that the evidence did not demonstrate subterfuge sufficient to warrant holding the individual sellers personally liable.¹⁶ The Western District noted, however, that there appeared to be evidence sufficient to show an agency relationship between the corporation and the individual sellers, and that this evidence would allow the buyers, on remand, to hold the sellers liable under a theory of undisclosed principal.¹⁷

The above-cited cases demonstrate that this Court has both the power and discretion to remand a case where a party's submitted theory is not supported by the evidence and where that party offers the jury no alternate theory. Moreover, these cases reveal the appellate courts' preference to remand cases under such circumstances. Finally, these cases demonstrate that the plaintiff may amend the petition on remand and submit the case on a theory of law which was not raised in the first trial.

CONCLUSION

For the reasons set forth in Respondent's *Substitute Brief*, the trial court's judgment should be affirmed.

¹⁵ 665 S.W.2d 33.

¹⁶ *Id.* at 40.

For the reasons stated in this *Supplemental Brief*, if this Court finds that the verdict and judgment were not supported by the evidence but the evidence would support a verdict and judgment under a different theory, remand of this case would be proper. Upon remand, the plaintiff could properly submit his on a theory not raised in the first trial.

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¹⁷ *Id.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were hand delivered, this 20th day of October, 2004 addressed to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Supplemental Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 1,904, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Respondent was scanned for viruses and was found virus-free through the Norton anti-virus program.
